

1 Hon. Jamal N. Whitehead
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

10 JOSHUA A. DIEMERT, an individual,)
11) Civil Action No. 2:22-cv-01640-JNW
12 Plaintiff,)
13)
14 v.) Plaintiff's Motion in Limine to Exclude
15) Expert Testimony of Tim Wise
16 THE CITY OF SEATTLE, a municipal)
corporation,)
17 Defendant.) Note on motion calendar Sept. 13, 2024
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Plaintiff Joshua A. Diemert hereby moves this Court to exclude the expert testimony of Defendant City of Seattle's expert Tim Wise under Federal Rule of Evidence 702. Wise describes himself as a "Lecturer/Educator/Author/Trainer" and "Consultant/Advisor" on "racial bias and inequity." Wise is more accurately described as a pop psychologist who earns six figures telling cities and companies what they want to hear, but with no academic pedigree, no scientific background, and no independent expertise to testify in a court of law as an actual expert.

Though Wise's education is limited to a bachelor's degree in political science, he opines on subjects ranging from psychology to philosophy, sociology, anthropology, human resources, and workplace investigations in his purported expert witness report and deposition testimony. But Wise is not a psychologist, philosopher, sociologist, or anthropologist (or scholar of any kind) and has no training in human resources or workplace investigations. Wise conducted no independent

1 research for his report, interviewed neither Diemert nor his former coworkers, and ignored
 2 thousands of relevant documents in this case. Wise repeatedly references Diversity, Equity, and
 3 Inclusion (DEI) literature as the basis for his opinions, yet the majority of the work he cites is not
 4 peer-reviewed. He also has a significant financial interest in perpetuating the type of racially
 5 discriminatory trainings Diemert's lawsuit challenges. Wise is not qualified in the topics he
 6 purports to be an expert on and his testimony is neither relevant nor reliable. This Court should
 7 exclude the testimony and report of Tim Wise and prohibit him from further testimony as an expert
 8 witness.

9 I. STATEMENT OF FACTS

10 A. Background

11 The Race and Social Justice Initiative (RSJI) is an official City of Seattle policy that
 12 requires employees to use race-based decision-making to do their jobs. RSJI directs employees to
 13 lead with race, “center People of Color,” “de-center whiteness,” and tells white employees to work
 14 at undoing their “whiteness” and “prioritize the leadership of Black, Indigenous, and People of
 15 Color” employees. Ex. A [DIEMERT_PROD03_08252]. Race-based RSJI principles inform City
 16 hiring and promotion, as well as all policies, projects, programs, services, procedures, and capital
 17 improvements within the City of Seattle. Ex. B, Sharkey Dep. Tr. 20:21–21:3; Ex. C,
 18 [DIEMERT_PROD04_12626]. As a result of RSJI, Diemert experienced severe racial harassment
 19 and discrimination during his time as a City employee. He was denied opportunities for promotion,
 20 Ex. D, Diemert Dep. Tr. 103:15–23, 108:4–11, 109:4–14 (March 22, 2024), and verbally assaulted
 21 by a coworker due to his race. Ex. D, Diemert Dep. Tr. 286:20–291:4 (March 22, 2024). Despite
 22 repeatedly informing his managers, supervisors, and union representatives of this treatment, the
 23 City refused to properly investigate or otherwise address Diemert’s complaints. Ex. D, Diemert
 24 Dep. Tr. 310:2–312:2 (March 22, 2024). This lawsuit followed, and Diemert’s equal protection,
 25 Title VII, and Washington Law Against Discrimination (WLAD) claims remain active following
 26 Defendant’s motion to dismiss. Order, Dkt. 28.

1 **B. Defendant's Proffered Expert Witness**

2 Wise is not a scholar. He is also not a psychologist, sociologist, human resources specialist,
 3 statistician, or expert in workplace harassment. His sole academic credential is a B.A. in political
 4 science and has never been published in a peer-reviewed publication. Ex. E, Wise Rep., Ex. B
 5 (Curriculum Vitae). Instead, Wise earns between \$200,000 and \$400,000 a year as a consultant,
 6 speaker, and author on “racial bias and inequity.” *Id.*; Ex. F, Wise Dep. Tr. 211:8–11.

7 Though Wise is not a scholar, psychologist, sociologist, human resources specialist,
 8 statistician, or expert in workplace harassment, Defendant proffers Wise as an expert witness in
 9 this case to opine on a host of issues that require in-depth knowledge in each of these specialties:

- 10 • The identification of racial bias, individually and institutionally.
- 11 • The reasons for differential perceptions of racial bias and hostility,
 especially the differences between white and non-white perceptions
 of these matters.
- 12 • The reasons for differential reactions to anti-racism analysis and
 DEI efforts in the workplace.
- 13 • The basis for anti-racism analyses that explore whiteness, white
 privilege, implicit bias, systemic racism, white supremacy culture,
 and power differentials.
- 14 • The practical importance of color-conscious (as opposed to color-
 blind) policies and practices in the workplace as a means for
 addressing unjust racial disparities therein, and finally,
- 15 • Critical Race Theory as an analytical framework for evaluating
 institutions in American society.

16 Ex. E, Wise Rep. 1.

17 Wise conducted no original research in preparation for his report, reviewed only limited
 18 RSJI materials, and acknowledged at deposition that he has no opinion on whether Diemert was
 19 “the victim of unlawful racial discrimination” or whether he experienced individual racial bias.
 20 Ex. F, Wise Dep. Tr. 112:16–21, 114:4–116:20, 128:12–23, 153:4–154:2. Nonetheless, Wise
 21 asserts in his report that the RSJI trainings and materials are (1) not biased against white employees
 22 and (2) evince no anti-white animus; (3) that the City of Seattle’s racially segregated employee
 23 affinity groups or caucuses are not discriminatory but “good pedagogical practice”; (4) that the
 24 racial discrimination Diemert experienced was not due to the RSJI program, but rather his own
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1 “predisposition to find fault with the materials” of RSJI; and (5) Diemert incorrectly perceived
 2 racial bias in the RSJI materials because “[t]he tendency for white Americans to perceive bias
 3 against us” is a “longstanding tradition.” Ex. E, Wise Rep. 10–14. In other words, Wise’s opinion
 4 is to blame the victim. This is not the work of an expert witness, and Wise should not be qualified
 5 by this Court to testify as one.

6 II. LEGAL STANDARD

7 Whether a witness is qualified to testify as an expert is a question of law. Fed. R. Evid.
 8 104(a) (A district court “must decide any preliminary question about whether a witness is
 9 qualified[.]”). Federal R. Evid. 702 permits a witness to testify as an expert only if he is “qualified
 10 as an expert by knowledge, skill, experience, training, or education.” If the witness meets this
 11 threshold determination for admissibility, the party proffering the witness as an expert must then
 12 prove the expert’s reliability and relevance by demonstrating to the court that “it is more likely
 13 than not” that (a) the expert’s “scientific, technical, or other specialized knowledge will help the
 14 trier of fact to understand the evidence or to determine a fact in issue;” (b) his testimony “is based
 15 on sufficient facts or data;” (c) the testimony “is the product of reliable principles and methods;”
 16 and (d) “the expert’s opinion reflects a reliable application of the principles and methods to the
 17 facts of the case.” Fed. R. Evid. 702; *see Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457,
 18 463 (9th Cir. 2014) (“We have interpreted Rule 702 to require that expert testimony be both
 19 relevant and reliable.”) (cleaned up). Rule 702 was amended in 2023 to “clarify and emphasize
 20 that expert testimony may not be admitted unless the proponent demonstrates to the court that it is
 21 more likely than not that the proffered testimony meets the admissibility requirements set forth in
 22 the rule.” Fed. R. Evid. 702, Committee Notes on Rules – 2023 Amendment (citing Fed. R. Evid.
 23 104(a)). The proffering party “must demonstrate that the expert’s findings are based on sound
 24 principles and that they are capable of independent validation.” *United States v. Cloud*, No. 1:19-
 25 cr-02032-SMJ, 2022 WL 801694, at *2 (E.D. Wash. Mar. 8, 2022).

26 The Advisory Committee also emphasized that the “critical questions of the sufficiency of
 27 an expert’s basis, and the application of the expert’s methodology,” are questions of admissibility,
 28

1 not weight. *Id.* District court judges serve as gatekeepers to ensure that scientific testimony is both
 2 reliable and relevant. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993).

3 The district court's gatekeeping function is not limited to "scientific" testimony, but rather
 4 extends to all expert testimony. *United States v. Hankey*, 203 F.3d 1160, 1167 (9th Cir. 2000) (citing
 5 *Kuhmo Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999)). As gatekeeper, the court's objective is
 6 to "make certain that an expert, whether basing testimony upon professional studies or personal
 7 experience, employs in the courtroom the same level of intellectual rigor that characterizes the
 8 practice of an expert in the relevant field." *Id.* at 152.

9 III. ARGUMENT

10 A. Wise Is Not Qualified on the Topics in his Report

11 Whether a proffered expert witness is sufficiently qualified under Rule 702 by knowledge,
 12 skill, experience, training, or education is a threshold determination. See *United States v. Figueroa-*
Lopez, 125 F.3d 1241, 1246 (9th Cir. 1997). Examples of characteristics courts consider in
 13 determining qualification include advanced degrees, qualifying as an expert in other cases
 14 involving the same issue, technical expertise, and the completion of trainings or proficiency tests
 15 in the relevant field. See, e.g., *F.T.C. v. BurnLounge, Inc.*, 753 F.3d 878, 888 (9th Cir. 2014)
 16 (doctorate in economics and advanced degree in mathematics sufficient for interpreting sales data);
 17 *Gold v. Midland Credit Management, Inc.*, 82 F.Supp.3d 1064, 1068 (N.D. Cal. 2015) ("numerous"
 18 past qualifications on subjects of credit reporting and consumer fraud insufficient to opine on
 19 whether statements made in debt collection violate federal statute); *Sundance, Inc. v. DeMonte*
 20 *Fabricating Ltd.*, 550 F.3d 1356, 1360 (Fed. Cir. 2008) (patent attorney not qualified due to lack
 21 of relevant technical experience with subject of patent); *United States v. Cloud*, 2022 WL 801694
 22 at *3 ("extensive trainings related to her field of practice," annual proficiency tests, and
 23 certification from international professional organization weighed in favor of qualification).

25 In his report, Wise offers opinions on five topics: (i) the root or intent of RSJI trainings or
 26 materials; (ii) the content of RSJI trainings as evidence of anti-white animus; (iii) Defendant's
 27 racial affinity groups or caucuses as evidence of anti-white animus; (iv) Diemert's interpretation
 28 of RSJI; and (v) the reasons for Diemert's perception of RSJI and the "tendency of white

1 Americans to perceive bias against us.” Ex. E, Wise Rep. 10–14. Wise is not qualified under Rule
 2 702 to opine as an expert on any of these topics.

3 Wise’s first three opinions are about the details of RSJI: its trainings, its materials, its racial
 4 caucuses and affinity groups, and the intention of the initiative’s designers. But Wise has only
 5 limited knowledge of and zero experience with these aspects of RSJI. Wise was not involved in
 6 developing the RSJI program, its trainings, or materials. Wise’s exposure to RSJI is limited; he
 7 reviewed approximately 15 select RSJI-related documents—a small fraction of the thousands of
 8 RSJI-related materials and training documents that Defendant produced in this case. Ex. E, Wise
 9 Rep. 52; Ex. F, Wise Dep. Tr. 153:4–154:2 (reviewed “a very limited subset of the hundred
 10 thousand documents or pages” in the case); 179:23–180:1 (only reviewed training materials
 11 referenced in First Amended Complaint). He did not review all of the trainings Diemert took, did
 12 not do a “deep dive” of RSJI’s parameters, logistics, and trainings, did not speak with any of the
 13 RSJI trainers that provided training to Diemert, and has never taken RSJI training himself. Ex. F,
 14 Wise Dep. Tr. 154:7–9; 174:19–22; 179:23–180:1; 182:12–15. So, when Wise opines that “[t]he
 15 RSJI trainings and materials, far from being rooted in racial bias against white people, are
 16 grounded in long-established and accepted frameworks for addressing racial disparities in the
 17 workplace,” that opinion is not based on any experience or knowledge of the intentions of RSJI’s
 18 architects or what its training and materials are “rooted in.” Ex. E, Wise Rep. 10. This lack of
 19 experience or knowledge of the RSJI creator’s intentions also makes Wise unqualified to opine
 20 that Defendant’s racial affinity groups and caucuses are “not animated by animus or bias in the
 21 least.” Ex. E., Wise Rep. 12.¹ Wise’s sweeping opinion that “[t]he content of the RSJI trainings, to
 22 which the plaintiff objects, are not evidence of anti-white animus” and that “in several cases, the
 23 materials undermine that allegation directly with content that says, literally, the opposite of what

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 25 ¹ The other opinion expressed in this section—that “[o]perating and offering intra-racial affinity
 26 groups or caucuses for employees is not evidence of anti-white animus or tantamount to ‘re-
 27 segregation’”—is an ultimate issue of law and therefore a question for the trier of fact, not an
 28 expert. Ex. E, Wise Report 12; *United States v. Diaz*, 876 F.3d 1194, 1197 (9th Cir. 2017); *see also*
Marketquest Group, Inc. v. BIC Corp., 2018 WL 1756116, at *3 (S.D. Cal. Apr. 12, 2018) (citing
 Fed. R. Evid. 704, 1972 Advisory Committee Note “clarifying Rule 704 as not permitting ‘the
 admission of opinions which would merely tell the jury what result to reach’”).

1 the plaintiff asserts,” are equally unmoored in experience or knowledge; Wise quite simply cannot
 2 be an expert on the content of trainings he has not seen and materials he has not reviewed.

3 Wise’s remaining opinions center on Diemert’s interpretation and perception of RSJI. Ex.
 4 E, Wise Rep. 14–15. He first opines that “[m]uch of the plaintiff’s interpretation of the RSJI seems
 5 to reflect a political or ideological predisposition to oppose the training materials and methods—a
 6 predisposition that has been heightened by the current political climate in which DEI efforts and
 7 any substantive discussions of race and racism are under attack.” Ex. E, Wise Rep. at 14. Wise
 8 finds Diemert’s language “suggestive of his own political and ideological opposition to the
 9 materials presented,” that he “deploy[s] tropes and verbiage increasing[ly] common among those
 10 who, for political reasons, are attacking any substantive discussion of race in schools or workplaces
 11 across the country,” that his language is “suggestive of an ultra-conservative worldview,” and “the
 12 fact that he resorts to” this language to describe RSJI “indicates an opposition likely more
 13 grounded in politics” than experiences of racial discrimination. *Id.* This, Wise opines, “suggests a
 14 predisposition to find fault with the materials, irrespective of actual content.” *Id.*

15 However, Wise is not a psychologist. Ex. F, Wise Dep. Tr. 205:11–14. He is not a social
 16 scientist. Ex. F, Wise Dep. Tr. 128:23. Wise has never even spoken with Diemert about his
 17 interpretation and perceptions of RSJI or anything else. Ex. F, Wise Dep. Tr. 205:15–20. Without
 18 this, Wise has no knowledge, skill, experience, training, or education to qualify him as an expert
 19 on Diemert’s use of language or what may or may not suggest about Diemert’s interpretation of
 20 RSJI.

21 Wise is equally unqualified to opine that Diemert’s perceptions of the RSJI materials and
 22 analysis are explained by “[t]he tendency for white Americans to perceive bias against us (even in
 23 the absence of evidence).” Ex. E, Wise Rep. 14–15. This opinion is little more than a broad cultural
 24 stereotype, based on a literature review and Wise’s personal experience “doing what we can loosely
 25 refer to . . . as DEI trainings, or analysis, or work in the workplace,” not any kind of specialized
 26 knowledge, training, or education. Ex. F, Wise Dep. Tr. 131:13–24. Wise’s opinions on this topic
 27 should be excluded. *See Jinro America Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 1006 (9th
 28 Cir. 2001) (excluding proffered expert for cultural stereotyping and lack of training in sociology

1 or anthropology, “academic disciplines that *might* qualify one to provide reliable information about
 2 the cultural traits and behavior patterns of a particular group of people of a given ethnicity or
 3 nationality”).

4 **B. Wise’s Testimony Is Not Reliable**

5 Even if this Court finds that Wise satisfies Rule 702’s qualification threshold, which he
 6 does not, his testimony is still fatally unreliable. In making admissibility determinations on
 7 reliability, district court judges may consider factors like: “1) whether a theory or technique can
 8 be tested; 2) whether it has been subjected to peer review and publication; 3) the known potential
 9 error rate of the theory or technique; and 4) whether the theory or technique enjoys general
 10 acceptance within the relevant scientific community.” *Hankey*, 203 F.3d at 1167 (citing *Daubert*,
 11 509 U.S. at 592–94). Whatever factors are used, a non-scientist expert’s opinion must receive the
 12 same degree of “scrutiny for reliability as an opinion from an expert who purports to be a scientist.”
 13 Fed. R. Evid. 702, Advisory Committee Note to 2000 Amendments. This is because Rule 702 does
 14 not “create[] a schematism that segregates expertise by type while mapping certain kinds of
 15 questions to certain kinds of experts.” *Kuhmo Tire*, 526 U.S. at 151. Expert opinion testimony is
 16 reliable “if the knowledge underlying it has a reliable basis in the knowledge and experience of
 17 the relevant discipline.” *Alaska Rent-A-Car, Inc. v. Avis Budget Group, Inc.*, 738 F.3d 960, 969 (9th
 18 Cir. 2013). Reliable testimony must also be “more than subjective belief or unsupported
 19 speculation.” *Daubert*, 509 U.S. at 590. While “no one denies that an expert might draw a
 20 conclusion from a set of observations based on extensive and specialized knowledge,” *Kumho Tire*,
 21 526 U.S. at 156, if those conclusions are based on unsubstantiated generalizations or opinions not
 22 derived by the scientific method they must be excluded. *Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert II)*, 43 F.3d 1311, 1316 (9th Cir. 1995).

24 Wise’s report lacks any basis in reliable scientific methodology and draws unsupported
 25 (and, as discussed below, irrelevant) conclusions about the content and purpose of RSJI trainings
 26 and materials, as well as Diemert’s beliefs about those trainings and materials. To start with, Wise
 27 conducted no independent research in forming his conclusions. Ex. F, Wise Dep. Tr. 128:12–23;
 28 174:19–22. Instead, Wise conducted a literature review of largely non-peer-reviewed sources, then

1 relied on his background as a DEI trainer, writer, and public speaker to opine on the intent of RSJI
 2 trainings and materials, Diemert's perceptions, and the tendencies of white Americans. Ex. F, Wise
 3 Dep. Tr. 116:21–117:3; 129:2–6.

4 Since Wise's conclusions are not based on independent research, to be reliable there must
 5 be “other objective, verifiable evidence that the testimony is based on ‘scientifically valid
 6 principles.’” *Daubert II*, 43 F.3d at 1317–18. This can be satisfied if the research and analysis
 7 supporting the proffered conclusions “have been subjected to normal scientific scrutiny through
 8 peer review and publication” in a “generally-recognized scientific journal that conditions
 9 publication on a bona fide process of peer review.” *Id.* at 1318 & n.6; *see Daubert*, 509 U.S. at
 10 593–94 (“[S]ubmission to the scrutiny of the scientific community is a component of ‘good
 11 science,’ in part because it increases the likelihood that substantive flaws in methodology will be
 12 detected.”).

13 Wise's report fails here too; the majority of the sources he cites—nearly 60 percent—are
 14 not peer-reviewed. Ex. E, Wise Rep. 52–57. These non-scientifically scrutinized sources range
 15 from social media posts to the writings of Dr. Martin Luther King, Jr. to Wise's own books, which
 16 he cites 23 times. *Id.* Yet Wise relied upon this (majority not peer-reviewed) literature review as a
 17 basis for his conclusions on evaluating claims of anti-white bias, why white Americans like
 18 Diemert “often see ourselves as victims,” and what Wise terms Diemert's “pedagogical and
 19 content-based objections” to RSJI. Ex. E, Wise Report 15–42; Ex. F, Wise Dep. 128:12–129:6;
 20 131:13–20; 134:21–24; 139:13–16; 148:9–14; 192:25–193:6. Aside from the literature, Wise relies
 21 on anecdotes from his speaking and training work. For example, his opinion that white people
 22 “commonly assume that any advance for persons of color is evidence of anti-white bias” is based
 23 on his experience that “when we talk about these things, and when I talk about them, it is a very
 24 consistent thread of defensiveness or response.” Ex. F, Wise Dep. Tr. 194:20–195:6. Wise's
 25 opinions on the reasons for differing reactions to DEI in the workplace are based on “some
 26 literature” and his “personal experience doing what we can loosely refer to . . . as DEI trainings,
 27 or analysis, or work in the workplace.” Ex. F, Wise Dep. Tr. 131:13–24.

1 **C. Wise’s Testimony Is Not Relevant**

2 Even if Wise’s opinions were reliable—they are not—they should be excluded because
 3 they will not help the trier of fact understand the evidence or determine a fact in issue. *See Fed. R.*
 4 *Evid. 702(a).* Expert opinion testimony is relevant “if the knowledge underlying it has a valid
 5 connection to the pertinent inquiry,” *Alaska Rent-A-Car*, 738 F.3d at 969, and is “helpful” to the
 6 trier of fact. *Tekoh v. County of Los Angeles*, 75 F. 4th 1264, 1265 (9th Cir. 2023). Such testimony
 7 must be excluded if “its probative value is substantially outweighed by the danger of unfair
 8 prejudice, confusion of the issues, or misleading the jury.” *Daubert*, 509 U.S. at 595 (quoting Fed.
 9 R. Evid. 403); *United States v. Hoac*, 990 F.2d 1099, 1103 (9th Cir. 1993). Wise’s testimony is not
 10 closely connected to the underlying lawsuit, it addresses issues the average layperson can
 11 understand without expert assistance, and it is more likely to confuse rather than help the jury.

12 First, Wise’s opinions lack a valid connection to Diemert’s equal protection, Title VII, or
 13 WLAD claims or Defendant’s affirmative defenses. Wise admits that he offers no opinion on
 14 whether Diemert was “the victim of unlawful racial discrimination” or whether he experienced
 15 individual racial bias. Ex. F, Wise Dep. Tr. 112:16–21, 114:4–116:20.² Wise’s report offers no
 16 opinions to support Defendant’s affirmative defense that its “actions were undertaken for
 17 legitimate, nondiscriminatory reasons and no unlawful factors motivated Defendant.” Answer,
 18 Dkt. 31 at 59. Wise’s report also offers no opinions to support Defendant’s affirmative defense that
 19 “other legitimate factors” motivated Defendant’s actions and that Defendant “would have taken
 20 the same actions with respect to Plaintiff in the absence of any impermissible motivating factors.”
 21 *Id.* The pertinent inquiry in this case is whether Diemert was treated differently by his employer
 22 because of his race, and whether that race-based differential treatment created a hostile work
 23 environment. Wise’s conclusions speak to neither of those issues and should be excluded. *See*
 24 *Barabin*, 740 F.3d at 463 (relevancy requires the evidence “logically advance a material aspect of
 25 the party’s case”), *overruled on other grounds*, *United States v. Bacon*, 979 F.3d 766 (9th Cir.
 26 2020).

27 ² Nor did Wise review any of the complaints of racial discrimination made by other Human
 28 Services Department employees that Defendant was compelled to produce pursuant to the Court’s
 July 9, 2024, Order. Dkt. 52.

1 Second, Wise opines on concepts that are well within an average juror's understanding.
 2 Under Rule 702, expert testimony is helpful to the jury "if it concerns matters beyond the common
 3 knowledge of the average layperson and is not misleading." *Moses v. Payne*, 555 F.3d 742, 756
 4 (9th Cir. 2009). The jury does not need an expert witness to explain whether a reasonable person
 5 would believe that the RSJI trainings and materials Diemert was exposed to exhibit racial bias or
 6 animus—the jury is presumably composed of reasonable people who can evaluate the evidence
 7 using their own knowledge and experience. *See Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1046–
 8 47 (9th Cir. 2013) ("Specialized or technical knowledge is not required to understand [plaintiff's]
 9 straightforward assertions."). In that same vein, the jury does not need an expert witness to explain
 10 the true motivations behind Diemert's perceptions and interpretation of RSJI or to interpret his
 11 experiences of workplace discrimination and harassment—the jurors will hear from Diemert and
 12 his former coworkers and are capable of making those determinations themselves.

13 Finally, Wise's testimony is more likely to confuse the jury than help it. In particular, Wise
 14 twists straightforward concepts that are central to this case into a maze of jargon. For example,
 15 Wise testified that he distinguishes "whiteness from the people called white. People called white
 16 may find themselves in a—in a system and a society where whiteness has become relevant. And
 17 in fact, if it had not become relevant, they wouldn't be called white. But I'm distinguishing that
 18 from white people." Ex. F, Wise Dep. Tr. 132:20–133:2. And while the crux of Diemert's case is
 19 whether he experienced discrimination on the basis of race, Wise muddies this concept as well:

20 So can a white person be the victim of discrimination? Absolutely,
 21 and no one's ever denied that to my knowledge. Are they victims of
 22 racism at a systemic and structural level? I would argue no. Can they
 23 be victims of interpersonal bias? What some may call, and I'm
 24 perfectly comfortable racism? They can be, theoretically.

25 Ex. F, Wise Dep. Tr. 110:22–111:2. Even basic concepts like racism are unrecognizable in Wise's
 26 hands:

27 [R]acism is a sociological, or epistemological, or philosophical
 28 concept. It . . . isn't the same as racial discrimination. Racism isn't
 illegal. Racial discrimination is. And so, if I'm looking at the
 material to opine as to whether it's racist or hostile on the basis of
 race, I'm looking for indicators that don't necessarily speak to the
 law.

1 Ex. F, Wise Dep. Tr. 109:5–12. Wise’s philosophical meanderings serve only to confuse the jury
2 and offer no specialized knowledge on the claims at issue in this case—whether Defendant
3 unlawfully discriminated against Diemert because of his race.

4 **IV. CONCLUSION**

5 For the foregoing reasons, this Court should exclude the expert report and testimony of
6 Tim Wise and prohibit Wise from offering further opinion testimony in this case.

7 Pursuant to Local Civil Rule 7(e)(6), the undersigned certify that this motion contains 4,143
8 words.

9 DATED: August 16, 2024.

10 Respectfully submitted:

11 PACIFIC LEGAL FOUNDATION

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10 **CERTIFICATE OF SERVICE**

11 I hereby certify that on Aug. 16, 2024, I electronically filed the foregoing with the Clerk
12 of the Court using the CM/ECF system, which will send notification of such filing to all counsel
13 of record.

14 s/ Erin E. Wilcox
15 ERIN E. WILCOX
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